No. 12,923

IN THE

United States Court of Appeals

For the Ninth Circuit

JEWELL JAMES WILLIAMS,
Appellant,

vs.

E. B. SWOPE, Warden, U. S. Penitentiary, Alcatraz, California,
Appellee.

APPELLANT'S OPENING BRIEF.

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JURISDICTIONAL STATEMENT.

This is an appeal from a decision and order of the United States District Court for the Northern District of California, Southern Division, discharging appellant's writ of habeas corpus and remanding him to custody.

Jurisdiction of the trial court to entertain appellant's application and writ is found in Title 28, Chapter 153, Sections 2241, 2242, 2243, and following, United States Code.

Jurisdiction of this court to entertain this appeal is found in Title 28, Chapter 153, Section 2253, United States Code.

On June 13, 1950, appellant filed in the court below his petition for writ of habeas corpus (Transcript page 3), resulting in an Order to Show Cause Why Writ of Habeas Corpus Should Not Issue (Transcript page 5). After respondent below filed his return which was duly traversed, the court, after hearing, on November 24, 1950, ordered the writ of habeas corpus to issue. (Transcript page 12.) Thereafter appellee made return (Transcript page 17), which was duly traversed by appellant (Transcript page 15).

After hearing before the court below at which testimony was taken and exhibits introduced in evidence, the court took the matter under submission on written briefs and thereafter ordered the writ of habeas corpus discharged (Transcript page 19) upon the entry of appropriate Findings of Fact and Conclusions of Law. Thereafter the court lodged its Findings of Fact and Conclusions of Law (Transcript page 20) and entered its Final Order (Transcript page 27) discharging appellant's writ and remanding him to custody.

This appeal is taken from said decision and order of the United States District Court for the Northern District of California, Southern Division, discharging appellant's writ of habeas corpus and remanding him to custody.

ABSTRACT OF CASE.

By its findings of fact and conclusions of law (Transcript page 20) the court below upheld two sentences which appellant attacks on jurisdictional grounds. The trial court also found that said sentences were the only sentences by virtue whereof appellant is now held. The grounds upon which appellant questions the correctness of the ruling of the court below in upholding said respective sentences is the basis of this appeal and will be considered separately by consideration of the proceedings before the respective courts which pronounced said sentences.

SPECIFICATIONS OF ERROR.

I.

The court below erred in finding the judgment and sentence of the United States District Court for the Western District of Missouri, Southern District (case number 5208 therein), to be proper and valid.

II.

The court below erred in finding the judgment and sentence of the United States District Court for the Western District of Arkansas, Fort Smith Division (case number 4631 therein), to be proper and valid.

ARGUMENT.

THE MISSOURI SENTENCE.

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

On October 9, 1946, appellant herein was arraigned before the United States District Court for the Western District of Missouri, Southern Division, case number 5208 therein. Prior to said arraignment appellant had been held for a period of approximately two months at the medical center at Springfield, Missouri, although he had not theretofore been arraigned.

On said day appellant was brought before the court with counsel appointed by the court approximately 36 hours earlier. Appellant met his counsel for the first time on the morning of arraignment and trial (which followed immediately), and appellant's only opportunity to confer with counsel was a five minute conference in the corridor just prior to arraignment. Although said counsel stated to the court that he was not prepared even to plead, the court forced appellant to trial on plea of not guilty entered by the court. (A twenty minute recess was allowed just prior thereto.) (Petitioner's Exhibit No. 1, pages 1-10.)

It was upon the foregoing basis that court appointed counsel was forced to rely in presenting (without preparation) to the court an affirmative defense (incompetence). The basic physical facts of the charge (assault) were admitted.

The entire record of proceedings in said cause is before this court as it was before the court below

in the form of an exhibit (Petitioner's Exhibit 1). The first ten pages of said transcript set forth the facts upon which appellant now questions the jurisdiction of the trial court.

The right to assistance of counsel means the effective assistance of counsel.

Powell v. Alabama, 287 U.S. 45.

Right of accused to counsel includes time for adequate preparation.

Wood v. U. S., 128 F. (2d) 265;
Powell v. Alabama, 287 U.S. 45.

The right to counsel is jurisdictional.

Johnson v. Zerbst, 304 U.S. 458.

It is submitted that if the facts as set forth in the proceedings before said trial court satisfy the constitutional requirements, the right to counsel is not.

THE ARKANSAS SENTENCE.

On January 27, 1947, appellant was brought before the United States District Court for the Western District of Arkansas, Fort Smith Division, in case number 4631 therein, for arraignment. After some altercation regarding charges from other districts, the court read to appellant the first count of the indictment in said cause on Dyer Act violation, thereafter stating (Petitioner's Exhibit 2, page 22):

"The Court. * * * That is count 1 in the indictment. In other words, in plain language count one charges that on or about January 12, that you transported a stolen motor vehicle, the Chevrolet sedan, belonging to E. M. Rowland, Bartlesville, Oklahoma, from Joplin in the state of Missouri, to Van Buren in the state of Arkansas."

The court thereupon defined the possible sentence and there followed further colloquy regarding other charges.

The court returned to the matter of plea:

"The Court. * * * No, I am just arraigning you now. Do you plead guilty or not guilty on this charge, that is all."

(No immediate response from defendant or attorney.)

"The Court. Enter a plea of not guilty, Mr. Clerk.

The Defendant. Your Honor, I haven't had a chance to answer that. If I——

The Court. I have asked you.

The Defendant. I wouldn't want to prejudice this court against me. I want to be fair."

The court, at this point, proceeds to upbraid defendant on a totally irrelevant matter. (Petitioner's Exhibit 2, page 23.)

The court ultimately returns to the matter of plea:

"The Court. * * * I ask you again, are you guilty or not guilty on count one *that the court has explained to you?*

The Defendant. Your Honor, I haven't got any reason to enter a not guilty plea. I'll say guilty to the charge and let the court do as it wishes.

The Court. If you are not guilty I want you to say so. *If you are guilty I want you to say so.* You thoroughly understand the charge against you. Are you guilty or not guilty?

The Defendant. I'm guilty."

The court continues to put charges to appellant. Each time he answers "guilty". Once he attempts to explain his plea and once he attempts to make a qualified answer. But in the end the court exacts an unqualified statement of guilt from him on each count.

APPELLANT WAS FORCED TO PLEAD BY THE TRIAL COURT.

A plea of guilty must be freely and voluntarily made. In *Fogus v. United States,* 34 F. (2d) 97, the court stated:

> "Before receiving a plea of guilty in a criminal case, the court should see that it is made by a person of competent intelligence, *freely and voluntarily* * * * "

See also:

Wood v. U. S., 128 F. (2d) 265.

It is difficult for me to see how the record could more forcefully indicate that the plea was *not* free and voluntary.

The court's own action in directing the clerk to enter a plea of not guilty indicates that appellant was not disposed to plead guilty. True, he wished to be heard, for he complained of not being permitted to answer. But immediately thereafter he made it clear that he was not proceeding with knowledge of his right to stand mute or deny his guilt. At this point appellant's attention was diverted by the court from the plea. When the proceedings returned again to the matter of plea, the appellant said: "I haven't any reason to enter a not guilty plea. I'll say guilty to the charge and let the court do as it wishes." Thereupon, the court said: "If you are not guilty I want you to say so. *If you are guilty I want you to say so.* Are you guilty or not guilty?"

This was a demand for a plea—made after appellant had already stood mute. Appellant was not advised that he might permit the plea to remain as entered—not that it would have made any difference if he had. He acted clearly in response to the court's demand. The action of the court forced a confession out of appellant.

A plea of guilty is a confession of guilt.
16 *Corpus Juris* 402, section 738.

Such action is forbidden by the Fifth Amendment to the United States Constitution which provides that no person "shall be compelled in any criminal case to be a witness against himself." The laws of the United States governing criminal procedure have been drawn in recognition of this right. Section 564 of Title 18, United States Code (the law in effect at the

time of the proceedings in question) specifically provided:

> "When any person indicted for any offense against the United States * * * upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter a plea of not guilty on his behalf * * *"

This was not done.

THE TRIAL COURT INCORRECTLY SUMMARIZED THE SUM AND SUBSTANCE OF THE CHARGE AGAINST APPELLANT CONSTITUTING THE GRAVAMEN OF THE CHARGE TO WHICH APPELLANT WAS FORCED TO PLEAD.

Attention of this court is here invited to the summarization of the substance of the charge against appellant on the first count of the indictment. (Petitioner's Exhibit 2, page 22.)

The court omitted from said summary the fact that appellant must have acted with knowledge that the automobile in question was, in fact, stolen. In this behalf, note further the court's statement (Petitioner's Exhibit 2, page 24): "* * * I ask you again, *are you* guilty or not guilty on count one *that the court has explained to you?*"

Appellant was not called upon to plead to the indictment but to the charge as explained to him by the court. An admission of said facts admits nothing.

A plea of guilty admits only that which is well charged in the indictment.

16 *Corpus Juris* 403, section 738;
Hocking Valley R. Co. v. U. S., 210 F. 735.

In the present instance, although the indictment itself may perhaps have been in correct form, the court undertook to explain the charge and nature thereof to appellant. In so doing the court misrepresented the nature of the charge.

A plea must not be induced by misrepresentation.
16 *Corpus Juris* 401, section 737.

This case involves no close point of law. The rights of appellant which have been violated are basic, fundamental, and jurisdictional. The allegations of appellant are found solely upon facts disclosed by the record and which are undisputed. The order of the court below should be reversed and appellant discharged from custody.

Dated, San Francisco, California,
July 30, 1951.

Respectfully submitted,
JOSEPH L. BORTIN,
Attorney for Appellant.